

# Destitution or Constitution

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Maximilian Steinbeis Sa 11 Feb 2017

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Dear Friends of Verfassungsblog,

if one views the cases of Donald Trump, Theresa May and Jarosław Kaczyński in comparison, a pattern seems to emerge: All three of them, within weeks after taking power, found themselves enmeshed in legal battles over the scope of the constitutional restraints imposed on them. All three of them do not readily accept that the law should be allowed to get into their way when it comes to the implementation of what they claim to be the "will of the people". All three of them, albeit with unequal success, were taken on not so much by the opposition but by high-ranking judges unafraid of popular outrage and unperturbed by the prospect of being painted as tools of competing political interests. All three of them gave or give their respective court systems the opportunity to hand down judgments of profound importance, as far as they stand, for the constitutional destinies of their countries.

Trump's case, the same as May's, is about executive powers in foreign affairs: Does the fact that immigration and national security are the domain of the Government mean that they can do whatever they please without any judicial scrutiny at all? Trump's lawyers have indeed made that claim (which is [not as outlandish under US constitutional law as it looks from outside](#)). Now, in its preliminary decision the [9th Circuit Court of Appeals](#) has told them in no uncertain terms that they are wrong: The claim that the judiciary should not only defer to the executive but abstain from constitutional review altogether in these matters "runs contrary to the fundamental structure of our constitutional democracy". For the time being, the USA – contrary to the explicit intent of the President – remains a constitutional democracy and by and large a place where power bows to law. If that is not good news, what is?

Unless the Supreme Court says differently, that is. Trumps capitalized [Twitter announcement](#) to see the 9th circuit judges "IN COURT" may seem easy to make fun of (aren't they already?) but is, as usual, dead serious. The Supreme Court Justices, all (currently) eight of them, will have to show their colours now.

The ninth Justice, if all goes to plan, will be Neil M. Gorsuch, a Harvard-trained judge of the 10th Circuit Court of Appeals and a man of staunchly conservative views in most of the matters dear to the heart of Trump's constituency. One of his [opinions](#) unearthed in the confirmation process, where he dissented from the finding of his colleagues that the shackling and arrest of a 13-year-old kid for repeatedly burping in school was legal, seems to suggest that he is amenable to reason, though.

For German readers, NICOLE SCHREIER has an explanation of [what Gorsuch's nomination is about and why it matters for the internal balance of the Supreme Court](#).

Trump's "SEE YOU IN COURT" tweet is disturbing also in being only the last of a whole barrage of attacks against the judiciary, culminating in his notorious "so-called judge" tweet last week. I have talked to MARK TUSHNET about the difference between [criticizing the content of judicial decisions and denying the competence of judges to make these decisions in the first place](#). Tushnet, a man of 71 years who has seen a lot, is definitely troubled about these Presidential oversteppings but not all up in arms so far: "One incident is not enough."

+++++ A Note by the WZB Social Science Center Berlin: +++++

*The WZB Berlin Social Science Center is currently accepting applications for PhD candidates to join a new research group, "Global Citizenship Law: International Migration and Constitutional Identity." The project, funded by a European Research Council Starting Grant, is jointly hosted by the WZB and the Robert Schuman Centre for Advanced Studies at the European University Institute in Florence, providing the students with a unique opportunity to benefit from Europe's two leading research institutes in the fields of immigration, citizenship, and global governance. For more details about the project, see [here](#).*

*The doctoral degree will be awarded in cooperation with one of the Berlin Universities (typically, Free University of Berlin or Humboldt University of Berlin); the call is also open to PhD students at other universities in Germany or abroad who are willing to relocate to Berlin for the duration of the contract.*

*Details about a vacancy in the field of “Constitutional Identity and Global Migration” are available [here](#).*

*Details about a vacancy in the field of “Citizenship and Governance in the European Union” are available [here](#).*

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## Where to flee to, what to flee from

In the eyes of Trump and his supporters, Europe is one big teeming mess of refugees and other ethnically and religiously unsavoury persons. Europeans who share this view will be shocked to hear what Paolo Mengozzi, Attorney General at the European Court of Justice, had to say in his opinion in *X. and X. v. Belgium*: Survivors of the hell of Aleppo who have nowhere left to turn to must be granted a visa to be able to board a plane and apply for asylum here in a proper and tidy way, instead of being forced to take to the sea, put their lives at risk, pay enormous sums to criminals for their passage and break the law when they cross borders. [From an ethical point of view I find this conclusion nothing less than compelling](#). Legally, it seems certainly defensible. Politically, of course, all hell would break loose if Mengozzi's point were confirmed by the Court, so I have little hope that this principled lawyer's cry of despair in the face of one of the biggest humanitarian catastrophes of our time will change much in the end.

Downright dangerous is in my view what happens in Germany right now, in the wake of the Constitutional Court's refusal to ban the right-wing extremist NPD party last month. The state of Lower Saxony has unshelved a decade-old plan to assign to the Speaker of the German Parliament the job to determine which parties are hostile towards freedom, democracy and the rule of law and to strip those parties of their share of state funding. The Second Chamber (Bundesrat) has referred the draft to a committee. A qualified majority in both Houses in the end seems not unlikely. My warning that this "party ban lite" procedure must, if at all, remain exclusively in the domain of constitutional law, as opposed to administrative law, is [here](#).

Marine Le Pen, the leader of the far right in France with a not implausible shot at the Presidency in May, has announced her plans for changing the French constitution and taking France out of the EU by means of a number of referenda. SÉBASTIEN PLATON explains how [this would work and why the implied appeal to the "will of the people" is just fake](#).

Slovakia's stint into authoritarianism back in the 90s is a matter of the past by now – or is it? As MICHAL OVÁDEK reports, [amnesty laws enacted under the autocratic leader Vladimír Mečiar have never stopped to haunt Slovakia's political and legal system](#). The most recent attempt to get rid of these laws builds on a thought by the German legal philosopher Gustav Radbruch, much in use in Germany's struggle with the legal legacy of the Nazi era: Law can be so unjust as to be no law at all. Will the Radbruch Formula help the Slovaks get out of their predicament and finally scrap those odious amnesty laws? Doubtful.

Finally, PAVLOS ELEFTHERIADIS takes another look at the *Miller* judgment by the UK Supreme Court to find what [tremendous service this judgment does to British constitutionalism](#): "It puts beyond doubt something that many legal theorists have doubted: constitutional change cannot happen in the United Kingdom through practice, evolution or change of opinion. Constitutional change can only happen through the proper channels of democratic law-making. This is not said anywhere explicitly in our unwritten constitution, but is now held to be true as a 'basic concept' of the constitution." So much for constitutional jurisdiction in these times of destitution.

## Elsewhere

- Does Trump read law blogs? He certainly [tweets](#) about them: BENJAMIN WITTES has been awarded the honor of being probably the first legal scholar ever to be quoted in an acting President's Twitter feed. This

is because he blamed the 9th Circuit judges for its [omission to mention the statute Trump's executive order relies on, and, generally, is unimpressed by the Court's reasoning](#). The weaknesses of the order might turn out more important when the case reaches the Supreme Court than the satisfaction Wittes' point gives to the easily flustered President, although that is, of course, very important too. Wittes' utterly nonplussed reaction to Trump's tweet is [here](#), including a reconstruction how his article probably gained the attention of the distinctly reading-averse President (i.e. through a morning TV show). JANE CHONG picks up Wittes' argument in substance and [finds the Court's omission "clever, if somewhat undisciplined"](#).

- Other interesting reads on the decision:
  - JONATHAN HAFETZ points to the [unanimity of the 9th Circuit decision](#) and considers it an important signal against Trump's habit of singling out and vilifying particular judges,
  - MARTHA MINOW and ROBERT POST [stand up for "so-called law"](#),
  - JACK BALKIN explains what a [constitutional crisis is and why this is not yet one](#),
  - MICHAEL McCONELL finds the Court of Appeals' decision no less flawed than Trump's executive order and recommends [scrapping that order and make a new one](#), as do [PETER MARGULIES](#) and [JOSH BLACKMAN](#),
  - EUGENE KONTOROVICH thinks that a Court should stick to the [legislative history when searching for evidence of discriminatory motives](#), as opposed to the President's campaign speeches and tweets, while ILYA SOMIN [disagrees](#),
  - JESSICA BRANDT calls on [Congress to step up and prevent the burden of reining in the President in matters of immigration and national security](#) from falling to the courts at all.
- On matters non-Trump: DANIEL THYM examines the EU [Commission's input to the reform of the Common European Asylum System](#),
- JOSEPH H.H. WEILER makes the [case for a kinder, gentler Brexit](#),
- CORINA HERI scolds the [ECtHR for not protecting the right of Poles to get a divorce](#),
- TOM HICKMAN enjoins public lawyers in the UK to open their eyes to ["public law's disgrace" – the fact judicial review is simply unavailable for most people who cannot afford the risk of taking the government to court](#).

To which, given all said, I could not agree more.

All best, and take care,

Max Steinbeis

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